82-1639

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CARLOS MARCELLO,

Petitioner,

v.

IMMIGRATION and NATURALIZATION SERVICE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Board of Immigration Appeals erred in identifying relief under Section 244(a)(2) of the Immigration & Nationality Act [8 USC 1254(a)(2)] with relief under Section 212(c) of that Act [8 USC 1182(c).]

2. Whether the Board of Immigration Appeals erred in finding no "significant changes of circumstances" since the decision of January 20, 1976.

3. Whether the Board erred in using an indictment as evidence in denying a motion to reopen deportation proceedings.

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Carlos Marcello, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit which denied the petition for review from the order of the Board of Immigration Appeals.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is reported at 694 F.2d 1033 and was filed on January 6, 1983. Its judgment of denial was filed the same day (Ap-

pendix B). The Opinion of the Board of Immigration Appeals was filed on July 1, 1981 (Appendix C).

JURISDICTION

The judgment of the Court below was entered on January 6, 1983. The jurisdiction of this Court is conferred pursuant 28 U.S.C. 1254(1).

STATUTES INVOLVED

8 U.S.C. 1182(c) (1976) provides:

"Aliens lawfully admitted for permanent residence who temporarily proceed abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1)-(25), (30) and (31) of Subsection (a) of this section."

8 U.S.C. 1251(a) (1976) provides in part:

"(a) Any alien in the United States (including an alien crewman) shall upon order of the Attorney General, be deported who -

(1) at the time of entry was within one or more of the ciasses of aliens excludable by law existing at the time of such entry.

* * *

(ii) is, or hereafter at any time after entry has been a narcotic drug addict, or who at any time has been convicted of a violation of, or conspiracy to violate, any law or regulation relating

to the illicit possession of or traffic in narcotic drugs or marihuana * * *"

8 U.S.C. 1254 (1976) provides in part:

"(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and * * *

(2) is deportable under paragraphs (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 1251(a) of this title; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence."

STATEMENT

On May 25, 1979, the petitioner, at the direction of the United States Court for the Eastern District of Louisiana, moved the Board of Immigration Appeals (hereinafter the Board) to reopen this deportation proceeding to permit him to apply for relief under Section 212 of the Act, 8U.S.C. § 1182(c). In a decision dated July 1, 1981 the Board denied the motion, upon the grounds that:

---

*The Petitioner here.

1. As the petitioner had been denied suspension of deportation under Section 244(a)(2) of the Act in 1976, he could not be considered for permission to return to an unrelinquished domicile under Section 212(c) of the Act in 1981, since the "record does not present any meaningfuly different factors than were last considered by the Board in 1976."

2. There were no "significant changes of circumstances" alleged which would have made out a case for a likely success on the merits.

3. There was at the time an outstanding criminal indictment of the petitioner.

On January 1, 1982, a petition for review was filed. On January 6, 1983, the United States Court of Appeals for the Fifth Circuit denied the petition for review, finding that the Board's denial of the motion was not arbitrary or capricious, not in accord with law, or in violation of procedural due process. The petitioner is now seeking a writ of certiorari to review the decision of the Court of Appeals.

REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

The decision of the Court of Appeals is singularly unenlightening on the issues raised in the petition for review. It simply list them and repeats a formula to the effect that it finds no error in the Board's decision. No attempt is made at analyzing the questions raised by the petitioner. In effect, the Court appears to be avoiding them by using the "arbitrary and capricious" standard as a screen, reiterating their phrase about finding no error of law or discretion.

It is the position of the petitioner that no administrative decision can possibly stand, even using this "arbirary and capricious" standard, if it so departs from previous Board precedent as to be unexplainable. The board did in fact commit three errors, virtually ignoring their own published opinions in similar cases. These three errors form the basis for this petition.

ARGUMENT

I. THE BOARD ERRED IN IDENTIFYING RELIEF UNDER SECTION 244(a)(2) WITH RELIEF UNDER SECTION 212(c).

The Board, in its decision of July 1, stated, at pages 3 and 4 (see Appendix C):

> "In the case before us, even were we to assume that the respondent* became eligible to apply for relief under section 212(c) subsequent to the Board's last order in this case, we would not find that fact to warrant reopening of these proceedings. In our last decision, considering the same favorable and adverse factors which would have been considered in determining whether relief was warranted the applicant under section 212(c), we concluded that the applicant had failed to establish that he was deserving of discretionary relief under section 244(a)(2)."

The Court of Appeals, in its decision, states (see Appendix A):

> "[2] Marcello first contends that the Board erred in identifying waiver relief under section 212(c) with the suspension relief section 244(a)(2), since the former's provision permits the Board a broader exercise of discretion in relieving an alien of the enforcement of deporta-

> tion consequences. We do not read the Board's decision as so doing. Rather, in determining whether there was a reasonable likelihood that discretionary relief under section 212(c) (waiver) would be exercised, the Board pointed out the strong and emphatically emphasized reasons that the Board had refused to exercise its similar discretion to afford section 244(a)(2) (suspension) relief. We see no error of law or discretion in the Board's so doing."

This is a statement of what the Board did, not an analysis of why its actions were legally correct or incorrect. The point of the petitioner is precisely that the types of discretion to be exercised under the suspension section and under the waiver of inadmissibility section are *not* "similar". They are, and have always been historically viewed as totally different. The Board has recognized this fact on numerous occasions, but, for reasons which will be discussed later, chooses to ignore it on this one.

The Board has ignored its own teaching in *Matter of Marin,* 16 I&N Dec. 581, 586 (BIA 1978), where it said:

> "As a general rule it is prudent to avoid cross-application, as between different types of relief from deportation, of particular principles on standards for the exercise of discretion."

This unfortunate confounding of two very different provisions of law has resulted in the respondent's being denied even an opportunity to be heard on his eligibility for relief under Section 212(c) simply because he was denied relief in 1976 under Section 244(a)(2).

An examination of the language of these two sections of the Act makes clear that they have nothing more in common than the act that they are both forms of discretionary

relief. It is as if to say that one denied voluntary departure under 8 U.S.C. 1254(e) five years ago cannot now possibly prove himself worthy of registry under 8 U.S.C. 1259, or one denied adjustment under 8 U.S.C. 1255 five years ago cannot prove himself a candidate for a waiver of excludability under 8 U.S.C 1182(d)(3). This approach to the discretionary administration of justice makes and amalgam of all the ameliorative provisions of the Act – historically different, legally independent – and says to an applicant that once he is found not to merit one such remedy, he may as well give up. This result could not possibly have been intended by Congress.

The suspension statute dirives from the Alien Registration Act of 1940, 54 Stat. 670. Although it was originally intended to be ameliorative in effect, Congress amended the provision several times, specifically restricting its use to a very small class of persons. It was never intended as an ordinary remedy, but rather conceived of as being in the nature of a substitute for a private bill. See S. Rep. 1515, 81st Cong., 2nd Sess., pp. 596, 600-610; S. Rep. 1137, 82nd Cong., 2nd Sess., p. 25; H. Rep. 1365, 82nd Cong., 2nd Sess., pp. 62-63.

The waiver provision, on the other hand, derives from the Seventh *Proviso* to Section 3 of the Immigration Act of 1917, 39 Stat. 875. Such waivers were commonly used under that Act, even given nunc pro tunc or retroactively. Unlike suspension, it allows for conditional or temporary grants.

The Board seems to have made Section 212(c) into a redundancy by equating denial of suspension with ineligibility for its relief. The impossibility of such a position as a matter of law is shown by referring to two cases wherein relief under Section 212(c) *was granted* after relief

under Section 244(a) had been *denied.* See *Matter of M,* 5 I&N Dec. 598 (BIA 1954); *Matter of V-I-,* 3 I&N Dec. 571 (BIA 1949)..

An examination of the very language of the two sections makes it clear that they have nothing in common but the general appellation of discretionary relief.

> Section 244(a)(2), 8 U.S.C. § 1254(a)(2), provides:
>
> "As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and –
>
> (2) is deportable under paragraphs (4), (5), (6), (7), (11), (12), (14), (15), (17), or (18) of section 241(a); has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent or child, who is a citizen of the U.S. or an alien lawfully admitted for permanent residence."

[The petitioner is deportable under 244(a)(11), 8 U.S.C. § 1182(a)(11), due to a 1938 conviction for possession of marijuana.]

Even if the Attorney General approves such an application for suspension of deportation, *Congress must specifically approve it.* 8 U.S.C. 1254(c)(3).

Section 212(c), 8 U.S.C. § 1182(c) provides:

> "Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1) through (25) and paragraphs (30) and (31) of subsection (a). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 211(b)."

There is no requirement of Congressional approval.

The untenability of the Board's identification of the two forms of relief is further evidenced by the fact that whereas suspension requires a showing of "exceptional and extremely unusual hardship" for relief, the waiver provision has no quantum of proof whatsoever. It is a total misreading of the law to say that one who cannot meet the former burden — the heaviest in the Act — cannot meet the latter.

This Court must now be told that the Board has, once again, managed to avoid the question of the illegality of the petitioner's 1961 deportation to Guatemala. It accomplished this marvel by stating that even if it "assumed" that the petitioner became eligible to apply by operation of law [See *Matter of Silva,* 16 I&N Dec. 26, (BIA 1976)] subsequent to their last order in the case,

> "Our decision today * * * is in no way based on either the manner of the respondent's 1961 entry or the fact that his presence in this country since 1910 was briefly interrupted in 1961."
>
> (See Appendix C.)

The petitioner is unquestionably statutorily eligible for relief under Section 212(c), which requires that the applicant have proceeded abroad "not under an order of deportation." Once again, the petitioner's attempt to get either "an administrative or a judicial determination of the validity of his 1961 deportation * * * has been effectively thwarted at every turn by almost fifteen years of judicial and administrative 'side-stepping' of the issue." *U.S. ex rel Marcello v. District Director,* 472 F. Supp. 1199, 1201 (E.D. La. 1979); reversed on other grounds, 634 F.2d 964 (5th Cir., 1981).

In the instant case, the petitioner has offered to prove – persistently, continuously and zealously, over the last twenty years – that he was not "deported" to Guatemala on April 4, 1961, but was kidnapped by persons acting illegally and under color of law. As noted above, the airing of this very complaint was one of the chief purposes of the instruction of the District Court to file this motion. Upon its filing, the Court said:

> "* * * a final determination of this issue would be virtually inescapable for the Board."

U.S. ex rel Marcello v. District Director, supra, at p. 1206.

It is undisputed that a deportation effected in violation of law is a nullity, and an alien who has been subjected to such an illegal act is entitled to be returned to exactly the same position as before its occurrence. It was held in

Marcello v. Kennedy [194 F. Supp. 750, 752 (D.C. D.C., 1961)]:

> "If the deportation were in fact and in law invalid, then the plaintiff would have the right to re-enter this country. Consequently, there is a justiciable controversy; there is a legal issue to be determined. Moreover, it would not do to say that the Government may deprive a person of a judicial remedy by taking prompt action and presenting the courts with a *fait accompli.* I do not think that the courts are as powerless as that."

This was in accord with *Delgadillo v. Carmichael,* 332 U.S. 388, 391 (1947), where it was clearly stated that an alien did not make an "entry" into the United States when he had no intention of departing. There is an eerie similarity to the petitioner's own condition:

> "We might as well hold that if he had been kidnapped and taken to Cuba, he made a statutory "entry' on his voluntary return. Respect for law does not thrive on captious interpretations."

The case most closely tracking the petitioner's own cirmstances is that of *Mendez v. INS.* 563 F.2d 956 (9th Cir., 1977). There, too, an alien was taken into custody and deported the same day without an opportunity to contact counsel. The Court there said, at p. 958:

> "There is no doubt that appellee's failure to notify appellant's counsel of the order to report was procedurally irregular . . . In the instant case, notice to counsel would have allowed an opportunity to forestall deportation until the motion for reconsideration was properly filed. Appellant's right to counsel, his right to petition

> for reconsideration on the basis of new facts, and his right to judicial review and procedural due process became meaningless when he was deported without notice to his counsel."

The Court found this violative of both regulation and the statute, in that the right to counsel embodied in 8 U.S.C. 1252(b) was made a mockery of. The appellant was ordered returned to the United States.

See also, *Yang v. INS,* 574 F. 2d 171 (3rd Cir., 1978); *U.S. v. Calderon-Medina,* 591 F.2d 529 (9th Cir., 1979); and *Jung Been Suh v. INS,* 592 F.2d 230 (5th Cir., 1979).

Documents were supplied to the District Court in *U.S. ex rel Marcello, supra,* which clearly showed that:

1. The Service knew as a matter of fact that the petitioner was not a native of Guatemala.

2. That it deliberately lied to the Government of Guatemala about the petitioner's place of birth.

3. That its legal advisors told the Commissioner that if the petitioner had the opportunity to contest the allegation that he was born in Guatemala, a litigable issue would be presented.

4. That the Service deliberately, illegally and unjustifiably refused to let the petitioner call his wife of his attorney, and, without due process of law, kidnapped him to Guatemala on April 4, 1961.

It was the presentation of these documents, obtained under the Freedom of Information Act, which resulted in the order of the District Court to file the motion which the Board saw fit to deny.

As a consequence of this kidnapping, the petitioner was

subjected to *two* criminal prosecutions which he would not otherwise have been subject to. As the District Court said:

> "If petitioner's rights have been violated as he alleges, then under *Mendez* he is entitled to have his day in court on this issue."

The petitioner submits that his issue – which has been festering for twenty years – deserves the Board's full consideration, and the hearing should be reopened simply to end this continuing scandal, if for no other reason.

At least the Court of Appeals in *U.S. ex rel Marcello v. District Director, supra,* had the grace to state:

> "The order (of deportation)* was not executed until 1961, however, when it was apparently executed illegally; arguably Marcello was shanghaied to Guatemala without prior notice to him or to his attorney by means of a Guatemalan birth certificate that the Immigration and Naturalization Service (INS) may have known was a forgery." *Petitioner's parenthesis.

Surely the Court of Appeals in the instant action should have taken notice of the Board's obdurate insistance on the irrelevance of the illegality of the 1961 deportation. At a minimum, the subjection of the petitioner to two criminal prosecutions he would not have otherwise been subjected to must militate towards a favorable exercise of discretion.

In sum, the petitioner is eligible for relief under Section 212(c) and the Board should be made by judicial main force to say that he is, even though this clearly requires a ruling that the 1961 deportation was an illegal act and a nullity. The Board should also be made to enter a decision on the questions of whether or not the petitioner merits

relief *under Section 212(c),* not under Section 244(a)(2), keeping in mind that both Congress and the Board have differing rules for each of the two forms of relief. To permit otherwise is to allow a flouting of Congressional intent in enacting two different laws to cover two different situations in which aliens may apply for relief.

II. THE BOARD ERRED IN FINDING NO "SIGNIFICANT CHANGES OF CIRCUMSTANCES" SINCE THE DECISION OF JANUARY 26, 1976

The Court of Appeals found "no error or abuse in" the Board's reasoning that, in the "absence of significant changes in circumstance (other than the passage of time), Marcello had not borne his burden of establishing the prima facie case requisite for reopening the deportation proceedings, since . . . Marcello had not established that there was a reasonable likelihood that the Board would exercise its discretion to afford Section 212(c) (waiver) relief." See Appendix A, p. 1a.

Again, this is simply a statement of what the Board did, with no analysis of why it was legally correct or incorrect. And, once again, the error of the Board lay in its reiteration that because it found the petitioner unworthy of relief under Section 244(a)(2) five (now seven) years ago, an Immigration Judge in a reopened deportation hearing, after hearing all the evidence in the case, would have to deny relief under the much less stringent standards of Section 212(c). It is simply not believable that the Court could find this dangerous and extravagant position to be acceptable.

In *Matter of Rodriguez,* 17 I&N Dec. 105 (BIA 1979), it was held that a motion to reopen should be denied when "the requested relief would *surely be denied* in the exercise

of discretion, and therefore, no useful purpose would be served by granting the motion." [Emphasis supplied.]

The Board goes on to say that it is entitled to "factual allegations which indicate that the adverse factors of record may be overcome by the equities presented"; in other words, that the statutory requirements have been satisfied and that the grant *may* be warranted as a matter of discretion.

The Board was justified in denying the petitioner's motion to reopen only if there was absolutely no possibility that the requested relief could be granted under any circumstances, no matter what allegations of the petitioner may be proved at a hearing.

At the time the motion was filed and at the time the Board made its decision, the case of the petitioner for 212(c) relief was stronger in almost every way than those cases in which relief was actually granted. The Board was presented with a chart comparing the reported precedent cases with the petitioner's own, clearly showing this disparate treatment of the petitioner. (It is reproduced as a note at the end of this petition.) The Board apparently chose to ignore these cases, and, as is their wont, to impose a special standard on the petitioner here — one to which no other alien save he is ever to be held.

Subsequent to the decision of the Board, the petitioner was convicted of conspiracy in the United States District Court for the Eastern District of Louisiana, and of conspiracy to bribe a federal official in the Unitd States District Court for the Central District of California. These convictions, however, cannot be added to the negative factors to be weighed in the petitioner's case while appeals from them are pending. See *Will v. INS,* 447 F.2d 529 (7th

Cir. 1971); *Matter of Marino,* 15 I&N Dec. 284 (BIA 1975), reversed in *Marino v. INS,* 537 F.2d 686 (2nd Cir. 1976). Appeals are now pending in both of these cases.

Even an alien confined in prison is eligible for Section 212(c) relief. See *Matter of Marin, supra.*

Regardless of whether the Board would be able to consider these convictions as factors on remand from this Court, the convictions did not exist at the time they entered their decision, and the facts as stated in the Note were absolutely correct. Even if these convictions are added to the factors to be considered, the petitioner's application, when compared to the other cases shown, *still* would stand every likelihood of success. At a minimum, the petitioner should have an opportunity to present his evidence on the point, which he has never had in the past.

As the Court in *Vissian v. INS,* 548 F.2d 325, 328 (10th Cir. 1977), stated:

> "We must therefore conclude that the Attorney General or his representative may pretermit a ruling on eligibility to apply for Section 212(c) relief in cases where such relief would not be granted *in any event."* [Emphasis supplied.]

The Board should, therefore, have ordered the hearing unless it is absolutely certain that there is no possibility of relief under Section 212(c) (see *Matter of Rodriguez, supra*). Exactly the opposite is the case here – there is still every likelihood that it *will* be granted. Under these circumstances, therefore, the Court in *Vissian, supra,* notes, at p. 330, the "factual basis for the exercise of discretion" must be established "in a full and fair hearing comporting with accepted principles of due process."

It should also be pointed out that in no case ever reported in the history of this statutory provision has Section 212(c) relief ever been denied to one whose length of residence approached that of the petitioner. It was just this thought which prompted the comment in *Matter of L*, 3 I&N Dec. 767, 771 (BIA 1949):

> "The most appealing single factor in the case is the continuous residence of this alien in the United States since he was a 2-year-old baby. Deportation in his case is in fact banishment."

The Board apparently considered that the "mere" passage of time "brought on by respondent's own appeals" should not be considered a significant change of circumstances in the petitioner's favor, citing for this proposition *Carnalla-Munoz v. INS*, 627 F.2d 1004 (9th Cir. 1980). This was a serious misconception of *Carnalla-Munoz*.

This idea derives from a footnote in that case, at p. 1006:

> "Since the time of their hearings, one of the petitioner's children gained resident status. Although consideration of hardship to that child is now appropriate, because the child's new status is a 'post-deportation' equity, it is entitled to less weight than it would otherwise demand."

The court took this concept from *Wang v. INS*, 622 F.2d 1341 (9 Cir. 1980), rev'd *sub. nom. INS v. Wang*, 450 U.S. 139 (1981), where it was stated:

> "We believe that equities arising when the alien knows that he is in this country illegally, e.g., after a deportation order is issued, are entitled to

> less weight than are equities arising when the alien is legally in this country. That is not to say that facts arising after a deportation order has been issued are to be totally discounted, however. Rather, we feel that it is necessary for the Board to consider *all* of the surrounding circumstances . . . [some] facts demonstrate only that life has not stopped for the alien merely because he is in the country illegally."

Life certainly has not stopped for the petitioner herein since he was ordered deported. It is a matter of record that he is a stateless person, born in Tunis of Italian parents while it was a French protectorate. It has not been through any fault of his own that the Service has been unable to deport him for lack of a receiving country. He cannot manufacture a nationality for the convenience of the Service and should not have his equities in any way "diluted" on this account. However the passage of time in his case is to be characterized, it is not "mere." The birth of one or two United States grandchildren more could not do more to strengthen the equities of petitioner – the strongest reported equities in the history of published INS decision.

Parenthetically, are those equities accumulated while the *Service* appealed the decision of the District Court also to be entitled to "less weight"?

In sum, the Board again virtually ignored the overwhelming case presented to it, militating the grant of relief under Section 212(c), just as it ignored other equities in 1976. It ignored the question of the legality of the 1961 deportation, just as it ignored the legality of the 1961 deportation in 1976. The petitioner could prove his worthiness of relief when the motion was filed and when the Board entered its decision, and, if only given a forum, could prove it still.

III. THE BOARD ERRED IN USING AN INDICTMENT AS EVIDENCE IN DENYING THE MOTION TO REOPEN

In its decision, the Board used the then pending indictment against the petitioner in the Eastern District of Louisiana as a "wholly independent" basis for denying the motion to reopen the deportation proceedings. In this context, they stated that ". . . a serious, unresolved criminal indictment gives adequate cause to deny the motion . . ." They cited no authority for this novel proposition of law.

The Court of Appeals expressed the following opinion:

> "Whatever doubts we might have had that an indictment (accusation) by itself is a ground to deny an alien's motion to reopen . . . the present is not an instance where an alien who has otherwise made a prima facie showing is denied a motion to reopen solely because of an indictment." (See Appendix A, pp. 5a-6a.)

The doubts of the Court were well founded, and this *is* an instance where a prima facie case has otherwise been made out. If the facts as shown in the Note to this petition are not sufficient to make out a prima facie case, the entire legal concept loses meaning.

The court goes on to state – "Further, to some extent the contention of impropriety in the Board's considering an indictment (accusation) is mooted by the admitted subsequent circumstance" of conviction.

The Board played a guessing game with a man's life in using an indictment as "evidence" in denying the petitioner's motion. The fact that it guessed right is wholly immaterial. This egregious error must be corrected.

An indictment is an *accusation* only, and has no legal meaning beyond that fact. See *U.S. v. Weinberg*, 129 F.

Supp. 514 (M.D. Pa. 1955); *United States v. Mitchell,* 372 F. Supp. 1239 (S.D. N.Y. 1973); *United States v. DeCavalcante,* 440 F.2d 1264 (3rd Cir. 1971); *United States v. Molin,* 244 F. Supp. 1015 (D. Mass. 1965); *Hayes v. United States* 296 F.2d 657 (8th Cir. 1961); *United States v. Glazion,* 402 F.2d 8 (2nd Cir. 1968); *Smith v. United States,* 273 F.2d 462 (10th Cir. 1959).

It is not proof of guilt. It is not proof of anything. See *United States v. Cantillon,* 309 F.Supp 700 (C.D. Calif. 1970); *United States v, Ciambrone,* 601 F.2d 6161 (2nd Cir. 1979); *Pino v. United States,* 370 F.2d 247 (D.C. Cir. 1966).

It is, however, proof of the "where-there's-smoke-there's-fire" school of jurisprudence which the Board has traditionally employed when deciding any matter related to the petitioner. *United States ex rel Marcello v. District Director, supra,* at p. 1207; see also *Rassano v. INS,* 492 F.2d 220 (7th Cir. 1974).

In conclusion, one might ask, if the Board was so disturbed by a "serious, unresolved" criminal indictment, why it simply did not await a verdict in the case, which in fact occurred a month after its decision. The resolution might as well have been an acquittal as a conviction, and may be an acquittal yet if the petitioner's appeal succeeds. This fact should be enough to show the folly of using an indictment as "evidence" in any case.

CONCLUSION

As has been shown above, the conclusion is inescapable that the Board would have reopened this case without comment or concern for anyone with the petitioner's equities other than the petitioner himself. For thirty years the respondent has been treating the petitioner differently than any other alien in the United States, and appears determined to expel him from the only home he has ever known even if it must ignore sixty years of binding precedents to do so

For this reason, the judgment of the Court of Appeals ought to be reversed, and the petition for certiorari granted.

Respectfully submitted,

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NOTE TO PETITION

Name	Time As Legal Permanent Resident	Crime(s) Convicted of	Children	Spouse	Other Relatives	Employed	Recency of Last Conviction
1. *Matter of Edwards*, 10 I&N Dec. 506 (BIA, 1964)	47 Years	Breaking and Entering; Larceny; Conversion	None	Yes	–	Yes	2 Years
2. *Matter of S*, 6 I&N Dec. 392 (Atty. Gen., 1955)	37 Years	Petty Larceny (4 times); Unlawful Operation of Gambling Operation; Gaming	–	–	–	Yes	20 Years
3. *Matter of V-I-*, 3 I&N Dec. 571 (BIA, 1949)	32 Years	Theft	3	No	Mother	No	11 Years
4. *Matter of G-Y-G-*, 4 I&N Dec. 211 (Atty. Gen., 1951)	33 Years	Entry Without Inspection; False Claim to U.S. Citizenship; Sale of Morphine; Perjury	3	Yes	–	Yes	22 Years

5. *Matter of Tanori*, 15 I&N Dec. 566 (BIA, 1976)	10 Years	Possession of Marijuana	1	Yes	Parents	No	3 Years
6. *Matter of L.*, 3 I&N Dec. 767 (Atty. Gen., 1949)	44 Years	Conversion; Statutory Rape; 2 Larcenies	None	Yes	–	Yes	19 Years
Petitioner's Case (Carlos Marcello)	70 Years	Possession of Marijuana; Assault & Robbery	4	Yes	6 Brothers 2 Sisters 11 Grandchildren	Yes	13 Years

APPENDIX A

Carlos MARCELLO, Petitioner,

v.

IMMIGRATION & NATURALIZATION SERVICE, Respondent.

No. 81--4528
United States Court of Appeals,
Fifth Circuit.

Jan. 6, 1983.

Petition for Review of an Order of the Immigration & Naturalization Service.

Before WISDOM, REAVLEY and TATE, Circuit Judges.

PER CURIAM:

In this petition for judicial review of an order of the Board of Immigration Appeals, the petitioner Marcello presents a narrow issue: did the Board abuse its discretion in denying his motion to reopen his deportation proceedings to permit him to apply for discretionary relief under section 212(c) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1182(c)? Finding no abuse of discretion under the present circumstances, we affirm.

Marcello, an alien born in Tunis in 1910 and brought to the United States at the age of eight months, was first ordered deported in 1953, on the basis of a 1938 marijuana conviction. His subsequent efforts to avoid deportation, as well as the equities for and against it, are fully described in his most recent appearance before this court. *United*

States ex. rel. Marcello v. District Director of Immigration & Naturalization Service, New Orleans, 634 F.2d 964 (5th Cir. 1981). There, we upheld an order of the Board refusing Marcello a suspension of deportation under section 244(a)(2) of the Act, 8 U.S.C. § 1254(a)(2).

The refusal of the Board was based (a) upon its factual determination that Marcelo did not possess the statutorily required good moral character, based on a criminal record covering a span of 38 years following the 1930 conviction, (*see* 634 F.2d at 979), and (b) on the independent ground that, even if statutory eligibility had been established, the Board would refuse to exercise its statutory discretion to suspend deportation, despite the hardship upon the petitioner and his family, because of "the respondent's longstanding criminal record, his imprisonment, and his gambling activities, combined with his lack of character reformation", 634 F.2d at 979. We found substantial evidence supported the first determination and that no abuse of discretion was reflected by the latter denial.

The relief there sought and denied was under section 244(a)(2), 8 U.S.C. § 1254(a)(2), a statutory provision permitting suspension of deportation, in the discretion of the agency, when certain statutory conditions are met.

While the suspension proceedings were still pending, in 1979 Marcello filed the present motion to reopen the deportation proceedings. The present appeal is from a denial of that motion. Thus, before us now is the petitioner Marcello's attempt to secure relief from deportation under an entirely independent provision of the Act, section 212(c). By this statute, the Board, in its discretion, may waive immigration requirements for aliens who have previously been admitted for permanent residency and

who have established a lawful unrelinquished domicile of seven consecutive years in the United States.

In denying the motion to reopen the deportation proceedings for the petitioner to be able to apply for relief under this latter (waiver) section 212(c) provision, the Board largely relied upon its previous reasons for denying *suspension* under section 244(a)(2). It found that Marcello had not alleged any significant changes of circumstances in the present motion that should permit him to apply for another form of relief that, similarly, was solely available upon a showing that a petitioner can establish that he warrants relief in the exercise of discretion. Finding that Marcello's motion to reopen did not make an adequate showing of likely success on the merits of this claim for discretionary section 212(c) (waiver) relief, the Board in the exercise of its discretion denied Marcello's motion to reopen to consider an application for relief under section 212(c).

By Marcello's petition for review, he does not question the standard utilized by the Board in determining whether to grant or deny a motion to reopen deportation orders to obtain discretionary relief under section 212(c):

[1] A motion to reopen, entitling the applicant to present new evidence (and involving further delay in the enforcement of a deportation order), is not available upon a bare showing of statutory eligibility. Rather, to be entitled to a reopening and further hearing, the alien must first make a prima facie showing that there is a reasonable likelihood that the relief sought would be granted at the reopened hearing. The prima facie showing includes not only that there is a reasonable likelihood that the statutory requirements for the relief sought are satisfied, but also a reasonable likelihood that a grant of relief may be war-

ranted as a matter of discretion. *See Matter of Rodriquez*, Interim Decision No. 2727 (BIA 1979).

In arguing that the Board erred in denying his motion to reopen and an opportunity even to present a showing that he was entitled to discretionary (waiver) relief under section 212(c), Marcello makes three contentions. These and our reasons for rejecting them are:

(1)

[2] Marcello first contends that the Board erred in identifying waiver relief under section 212(c) with the suspension relief section 244(a)(2), since the former's provision permits the Board a broader exercise of discretion in relieving an alien of the enforcement of deportation consequences. We do not read the Board's decision as so doing. Rather, in determining whether there was a reasonable likelihood that discretionary relief under section 212(c) (waiver) would be exercised, the Board pointed out the strong and emphatically emphasized reasons that the Board had refused to exercise its similar discretion to afford section 244(a)(2) (suspension) relief. We see no error of law or discretion in the Board's so doing.

(2)

Marcello next contends that the Board erred in finding no significant changes of circumstance following the 1976 suspension hearing and denial order. Without pointing out any significant factor, here Marcello rather argues that the Board should not have denied the motion to reopen under the strong equities presented by Marcello (life-long residence since a child of eight months, wife, children, grandchildren, family all in the United States) but previously rejected by the Board as being outweighed by the strong reasons (criminal record, etc.) for the Board to exercise its discretion to permit suspen-

sion of deportation. Marcello points out that he has been in this country five years longer and is now 72 years of age, so that deportation would involve even more hardship now. Marcello also cites other decisions where allegedly the Board took such factors into account.

[3] The Board found that the mere passage of five years did not by itself warrant a reopening, and that reopening following an unsuccessful judicial attack will only be ordered where there was a significant change in a factor critical to disposition of the case. The Board pointed out that, under the showing made by Marcello in his petition to reopen, no meaningfully different factors were involved than those earlier considered by the Board in the 1976 suspension proceedings and upon which the discretionary denial of suspension was there based. The Board concluded that, in the absence of significant changes in circumstance (other than the passage of time), Marcello had not borne his burden of establishing the prima facie case requisite for reopening the deportation proceedings, since in the Board's view Marcello had not established that there was a reasonable likelihood that the Board would exercise its discretion to afford section 212(c) (waiver) relief. Again, we find no error or abuse in this reasoning.

(3)

Marcello finally contends that the Board erred in adverting to an indictment for criminal conspiracy filed against the petitioner in 1980. Admitting that an indictment was merely an accusation, the Board found this to be an additional reason, where Marcello had earlier had been denied discretionary relief because of his past criminal conduct, for denying the motion to reopen "in view of the *further* doubts raised regarding the present lieklihood of success on the merits." Whatever doubts we might have had that

an indictment (accusation) by itself is a ground to deny an alien's motion to reopen to obtain discretionary relief under section 212(c), the present is not an instance where an alien who has otherwise made a prima facie showing is denied a motion to reopen solely because of an indictment. Further, to some extent the contention of impropriety in the Board's considering an indictment (accusation) is mooted by the admitted subsequent circumstance that since the Board's hearing Marcello was convicted of the crime charged by that indictment as well as of another offense.

Conclusion

[4, 5] The Board denied the petitioner's motion to reopen the deportation proceedings because, in accord with Board precedent, it found that such a motion may be denied unless the petitioner establishes that there is a reasonable likelihood that the relief sought by the reopened hearing will be granted. The Board found no such reasonable likelihood, based primarily on its earlier rejection after full consideration of identical reasons as justifying the exercise of its discretion to suspend the deportation. Under accepted standards, on judicial review we cannot disturb the exercise of administrative discretion to deny relief unless the denial was arbitrary or capricious, not in accord with law, or in violation of procedural due process. *Paul v. United States Immigration and Naturalization Sercie,* 521 F.2d 194, 197 (5th Cir. 1975). We are unable to say that the petitioner Marcello has met this burden that would permit this court to overturn the discretionary administrative decision to deny his motion tor reopen his deportation proceedings.

Accordingly, we DENY the petition for review.

PETITION FOR REVIEW DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 81-4528

CARLOS MARCELLO — Petitioner

versus

IMMIGRATION & NATURALIZATION SERVICE, — Respondent

PETITION FOR REVIEW OF AN ORDER OF THE IMMIGRATION AND NATURALIZATION

Before WISDOM, REAVLEY and TATE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of Carlos Marcello for review of an order of the Immigration and Naturalization Service, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the petition for review of an order of the Immigration and Naturalization Service in this cause be, and the same is hereby, denied.

It is further ordered that the petitioner pay to the respondent the cost on appeal to be taxed by the Clerk of this Court.

January 6, 1983

Issued as mandate January 28, 1983.

APPENDIX C
UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS
WASHINGTON, D.C. 20530

File: A2 669 541 – New Orleans JUL 1 1981
In re: CARLOS MARCELLO or
CALOGERO MINACORI

IN DEPORTATION PROCEEDINGS

MOTION

On Behalf Of Respondent: Mark A. Mancini, Esquire
1707 "H" Street, N.W.
Washington, D.C. 20006

On Behalf Of Service: Gerald S. Hurwitz
Appellate Trial Attorney

CHARGES:

Order: Sec. 241(a)(1), I&N Act (8 U.S.C. 1251(a)(1)) Excludable at entry section 212(a)(17), I&N Act (8 U.S.C. 1182(a)(17)) – arrested and deported, no permission to reapply

Sec. 241(a)(11), I&N Act (8 U.S.C. 1251(a)(11)) – Convicted of violation of law relating to illicit traffic in marijuana

Sec. 241(a)(11), I&N Act (8 U.S.C. 1151(a)(11)) – Convicted of violation of law governing the taxing, etc., of marijuana

APPLICATION: Reopening and reconsideration

On January 20, 1976, in the Board's last order in these lengthy proceedings, the respondent's appeal from a deci-

sion of an immigration judge denying his application for suspension of deportation under section 244(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1254(a)(2), was dismissed. The Board concluded both that the respondent had failed to meet the good moral character requirement of section 244(a)(2) and that he had not established that he warranted suspension of deportation in the exercise of discretion. On May 25 1979, the respondent moved the Board to reopen the deportation proceedings in order to provide him the opportunity to apply for relief under section 212(c) of the Act, 8 U.S.C. 1182(c), and in order to reconsider the denial of suspension of deportation. The motion will be denied.

At the time the present motion was filed before the Board, habeas corpus proceedings had been pending in the United States District Court for the Eastern District of Louisiana since 1976. On July 13, 1979, prior to the Board adjudicating the motion, the District Court vacated the Board's order of January 20, 1976, and remanded the case with instructions to conduct a hearing on the issue of the validity of respondent's deportation in 1961 and to further "evaluate and supplement" the record with regard to the respondent's good moral character and the Board's exercise of administrative discretion.[1] On January 22, 1981,

[1]The District Court's order in large part granted the respondent the matters sought in his May 25, 1979, motion to the Board. Had the Board been required to comply with the District Court's order, the proceedings would have had to have been reopened and remanded to the immigration judge for a further evidentiary hearing. Under such circumstances, the immigration judge would have been directed to reconsider the suspension application pursuant to the court's order and to consider the respondent's eligibility for relief under section 212(c). In practical effect, the District Court's order would have resulted in the granting of the respondent's 1979 motion to the Board in its entirety. The Board accordingly withheld adjudication of the motion pending appellate review of the District Court's decision.

the United States Court of Appeals for the Fifth Circuit reversed the judgment of the District Court and affirmed the Board's January 20, 1976, decision. The respondent's petition for a writ of certiorari was denied by the United States Supreme Court on June 8, 1981. *U.S. ex rel. Marcello v. District Director of Immigration,* 472 F. Supp. 1199 (E.D. La. 1979), *reversed,* No. 79-3219 (5 Cir. January 22, 1981), *cert. denied,* No. 80-1820 (U.S. June 8, 1981).

The respondent, through counsel, advances three reasons in support of the motion to reopen. First, it is submitted that since the Board's last decision in this case, it has now been "held that [section] 212(c) [relief] is available in deportation proceedings. . . ." *See Matter of Silva,* 16 I&N Dec. 26 (BIA 1976). Secondly, it is submitted that subsequent to the Board's 1976 decision, "evidence has become available . . . which leaves no doubt that [the] respondent on April 4, 1961, was deprived of access to his attorney and to the courts contrary to *Mendez v. INS,* 563 F.2d 956 (9 Cir. 1977)." Finally, it is submitted that the record should be "brought up to date and reconsideration given to respondent's character evidence and to whether respondent's 1968 assault conviction, now over 10 years old for conduct in 1966, bars relief herein."

In our decision of January 20, 1976, we concluded in part that the respondent had failed to establish that he warranted a favorable exercise of discretion so as to result in the suspension of his deportation. We do not find that the mere passage of over five years during which the respondent has unsuccessfully challenged the Board's order in federal court to in itself warrant a reopening to further consider the respondent's suspension application. Reopening following an unsuccessful judicial attack on a Board order will only be ordered where the respondent can

establish that there has been a significant change in a factor critical to the disposition of his case. Here, we do not find that the respondent has identified any substantial new evidence warranting further consideration of the application for discretionary relief under section 244(a)(2). With regard to the exercise of discretion, other than the passage of time, the record does not present any meaningfully different factors that were last considered by the Board in 1976.

We further find that the respondent has not established that the proceedings should be reopened to provide him the opportunity to apply for relief under section 212(c) of the Act. As with section 244(a) of the Act, section 212(c) does not provide an indiscriminate waiver for all who demonstrate statutory eligibility for relief. Instead, the Attorney General or his delegate is required to determine as a matter of discretion whether an applicant warrants the relief sought. The applicant bears the burden of demonstrating that his application merits favorable consideration. In the case before us, even were we to assume that the respondent became eligible to apply for relief under section 212(c) subsequent to the Board's last order in this case, we would not find that fact to warrant reopening of these proceedings. In our last decision, considering the same favorable and adverse matters which would have been considered in determining whether relief was warranted the applicant under section 212(c), we concluded that the applicant had failed to establish that he was deserving of discretionary relief under section 244(a)(2). As noted above, we have found that the respondent has not alleged any significant changes of circumstances in the present motion to warrant reconsideration of this finding. Under these circumstances, we find that the respondent has not established that the proceedings should be

reopened to allow him to apply for another form of relief which is also solely available if he can establish that he warrants relief in the exercise of discretion. As the respondent has not made an adequate showing of likely success on the merits, his motion to reopen to consider an application for relief under section 212(c) is denied in the exercise of discretion. *See Matter of Rodriguez.* Interim Decision 2727 (BIA 1979), and the cases cited therein. *See also INS v. Wang,* 101 S. Ct. 1027, 1030 n. 5 (1981); *INS v. Bagamasbad,* 429 U.S. 24, 25-26 (1976).

Further, for the same resons stated in our decision of January 20, 1976, we find no basis to reopen the proceedings resulting from the respondent's additional claims with regard to the legality of deportation in 1961. Our decision today, as was our decision then, is in no way based on either the manner of the respondent's 1961 entry or the fact that his presence in this country since 1910 was briefly interrupted in 1961.

Finally, in the Government memorandum in opposition to respondent's motion to reopen, it is indicated that the respondent is "currently under indictment for conspiracy, racketeering and fraud. . . . " Attached to the Service's memorandum is a Grand Jury indictment filed with the United States District Court for the Eastern District of Louisiana on June 17, 1980. In the respondent's supplemental brief of April 16, 1981, counsel acknowledges the indictment, but submits that it should not have any bearing on the adjudication of the motion because an indictment is merely an "accusation." We concur in respondent's counsel's characterization of a Grand Jury indictment. We do not find, however, that the accusatory nature of an indictment precludes it from being considered in the context of a motin to reopen where the respondent bears the burden of establishing that such proceedings should be

reopened for further consideration of discretionary matters. In the context of the present case, where the respondent has once been denied discretionary relief in the exercise of discretion, we find that the serious, unresolved criminal indictment gives adequate cause to deny the motion to reopen in view of the further doubts raised regarding the present likelihood of success on the merits. The respondent bears the burden of making a prima facie showing both of statutory eligibility for the relief sought and of a likelihood that discretion will be favorably exercised. *Matter of Rodriguez, supra.* We make this finding wholly independent of the bases for denying to motion to reopen stated above.

We find that the respondent has failed to adequately establish that the deportation proceedings herein should be reopened for the purposes stated in his motion to reopen. The motion will accordingly be denied. Further, the respondent's June 10, 1981, request for a stay of deportation pending adjudication of the motion is denied as moot and the respondent's April 16, 1981, request for oral argument is denied. *See* 8 C.F.R. 3.8.

ORDER: The motion is denied.

Acting Chairman

Chairman David L. Milhollan has abstained from consideration of this case.

Board Member James P. Morris has abstained from consideration of this case.